UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE DELTA AIR LINES INC. et al.,

Chapter 11

Debtors.

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KENTON COUNTY BONDHOLDERS COMMITTEE,

Appellant, New York, N.Y.

v. M-47 (JGK)

DELTA AIR LINES, INC. et al.,

Appellees.

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May 2, 2007
4:15 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

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BY: DAVID H. BOTTER
ABID QURESHI

(Case called)

MR. PICCA: Your Honor, I am here to move for the pro hac vice admission of my partners Bill Kannel and Matt Hurley.

THE COURT: Who have already appeared?

MR. PICCA: They have appeared.

THE COURT: I mean they just appeared for the Court.

MR. PICCA: Yes.

THE COURT: That is fine.

MR. PICCA: Thank you, your Honor.

THE COURT: No objections, right?

COUNSEL: No, your Honor.

THE COURT: The application is granted.

Welcome to the bar of the court for purposes of this

MS. MELNICK: Your Honor, I do not know whether they will actually appearing, the folks out in Kentucky at Zeigler & Schneider, but if I could also move their admission pro hac vice, I would be grateful.

THE COURT: Sure. No objection, right?

COUNSEL: No, your Honor.

THE COURT: The attorneys in Kentucky are admitted pro hac vice for purposes of this case.

OK. I have a couple of initial matters. This matter came to me on an emergency basis for initially an order to show cause for an expedited appeal and then an order to show cause for a stay.

I have spoken to the attorneys on the phone twice as far as I can recall on matters of scheduling and conflict issues. I wanted to cover those issues, because this is the first time I have all of you here and a court reporter.

The first issue that I raised with you was, there was

a service list initially that was given to me that had Debevoise & Plimpton as receiving papers in the case. I am a former partner at Debevoise, left it over 12 years ago, but I disqualify myself in Debevoise cases.

The lawyers assured me that Debevoise was not involved in these matters; Debevoise has appeared in other matters relating to the Delta bankruptcy; there is no statutory conflict, nothing about the fact that Debevoise would appear in other matters relating to the bankruptcy would affect anything that I did.

The parties said that there was no problem, no one saw it as a conflict, and I said all right, I was prepared to accept that. Let me raise it again at the outset to assure myself on the record that that is not an issue for any of the parties.

Is that right?

MR. SHORE: No, your Honor.

THE COURT: It is not?

MR. SHORE: Correct. There is no issue.

MR. HUEBNER: Your Honor, on behalf of Delta I can

again confirm for the record on the transcript that Debevoise is merely one of Delta's many law firms and has no connection at all to this matter and has not been giving advice on it or handling it. Davis Polk has been handling this, the only law firm that appears on the pleadings either below or before this court.

MR. KANNEL: Your Honor, on behalf of UMB Bank, NA, we have no issue.

MR. BOTTER: On behalf of the Post Effective Date Committee, we have no issue.

MS. MELNICK: On behalf of the Kenton County Airport Board, we have no issue as well.

THE COURT: Yesterday, the 7.1 statements came in, and the one issue raised with the 7.1 statements was the Post Effective Date Committee had as a member Coca-Cola. I promptly scheduled a telephone call with the lawyers to raise the fact that I held stock in Coke.

The parties said, oh, that wasn't a problem. It wasn't an issue because Coke was simply a member of the committee. They weren't directly involved in the issues on this appeal, and, as an added layer of assurance to me, Coke would recuse itself from any deliberations with respect to this appeal. No one had a problem with my being on the case and the lawyers said after all I had spent substantial time on the case before the 7.1 statement came in.

After I spoke to the parties, even after the assurances that the parties gave me, after further research on my own, I concluded that Coke's presence on the creditor's committee was a source of a potential disqualification, so because I had spent substantial time, substantial judicial time on the matter, I disposed of any interest in Coke in order to avoid any possible conflict or the appearance of any conflict.

I wanted to report that to you and to assure myself that that was satisfactory with everyone and that no one saw this current situation as any reason for any disqualification.

MR. HUEBNER: Your Honor, from Delta Airlines perspective, we were, as I said yesterday, quite comfortable even before the decision was offered in acceptance to recuse Coke from this and certainly are doubly and triply and quadruply, your Honor --

THE COURT: I can't hear you.

MR. HUEBNER: Coke is a very small vendor to Delta we do not believe there would have been any material impact, so we are very comfortable.

THE COURT: OK. Mr. Shore?

MR. SHORE: We thank you for your efforts, your Honor, and we have no objection.

THE COURT: OK.

MS. MELNICK: No objection on behalf of Kenton County Airport Board.

MR. KANNEL: No objection to behalf of UMB Bank. I do want to mention we are having some trouble in the back rows here hearing Mr. Huebner.

THE COURT: Yes. Mr. Huebner, please keep your voice up when you talk. I'll try to turn up the sound here also.

MR. HUEBNER: Thank you, your Honor. I will do my best.

MR. BOTTER: Your Honor, also on behalf of Post Effective Date Committee, Coke did agree to the recusal, but obviously this takes care of that issue.

Thank you, your Honor.

THE COURT: OK.

There are actually two orders to show cause that are

pending. One was for the expedited appeal.

The papers indicated that the parties had actually agreed to a briefing schedule to have it completely briefed I think within a month. But we can put over for a moment, more than a moment, the order to show cause for an expedited appeal and deal with the issue of the stay.

Plainly, I will authorize an expedited appeal. If the parties have agreed to what the schedule for the expedited appeal is, that's fine. I will just have to work out the date with you for the hearing on the appeal.

MR. HUEBNER: Your Honor, from Delta's perspective, just so the record is clear, we actually do not believe that

the appeal satisfies the standards for expedition. But since there was no reason not to be professionally courteous, and the exchange of e-mails understanding that we have been courteous without it being used against us and that nobody would argue that we agreed there was an urgency, we were very happy to agree to a reasonable briefing schedule, as were the other parties.

THE COURT: That is fine. I don't think anyone is conceding anything by agreeing to an expedited appeal, which leads us then to the order to show cause for a stay.

I have read the papers and I am prepared to listen to argument.

MR. SHORE: Thank you, your Honor.

Chris Shore from the law firm of White & Case for the Ad Hoc Committee of Kenton County bondholders, each of the

members being an individual appellant. I have three preliminary matters.

First, I think that on behalf of everybody I would like to thank the Court for making time on a very short schedule to hear us. We believe this is a serious matter, and we appreciate the efforts of the Court and the staff in adjusting your schedules to take it up.

Second, it is unclear how much time your Honor has this afternoon. I think you will find that, if given free rein, you will hear a lot from the talkers.

THE COURT: Let me ask a question. Whether I grant or deny a stay, is that immediately appealable?

MR. SHORE: The denial of the stay would be, your Honor. I believe a grant would, too.

THE COURT: So whether I grant or deny the stay, the parties would want me to do that as swiftly as possible so that if you wanted to, you could take it up to the Court of Appeals before the closing, which I understand is about 10:30 tomorrow morning?

MR. SHORE: Yes, your Honor.

THE COURT: OK. So, in response to the question about how long the arguments are, you can gauge your time accordingly.

MR. SHORE: Thank you, your Honor.

The third preliminary is we do have an objection that we haven't been able to resolve with respect to one of the exhibits that's been submitted, which was a document that wasn't before the bankruptcy court below.

We had offered to let your Honor take judicial notice of it as a filing in the case, but it goes to this issue of what the votes were and how they were tabulated. It is an affidavit submitted by somebody who isn't here. But, as I understand it, at least the airport will not concede -- or, I'm sorry, the indentured trustee will not concede that it doesn't come in for all purposes. I can raise it when we get to it in

the argument.

THE COURT: OK.

MR. SHORE: That is an issue.

In going forward today, and mindful of your Honor's admonition, I would skip a discussion of any of the procedural factors, the four Hirschfeld, factors whether the Court and how the court balances it and what the standard of review is here, and really focus on five issues that I think are critical to the determination.

One, what the indenture says. Before this hearing is over, I believe the Court has to understand what our interpretation of the indenture is and what the bankruptcy court's ruling below does in our view to the rights that are afforded to my clients under the indenture;

Second, I would like to discuss the jurisdiction and the power of the bankruptcy court to do what it did in the settlement order;

Third, I would like to discuss who these bondholders are and what is motivating them here. I think a good deal has been said, some of it not particularly nice, in the opposition

papers, and a lot of motives have been attributed that I would like to address, because I think there is some misperception;

Four, to answer the question why can't we just let the transaction close and address this on the expedited appeal, obviously we recognize the reluctance of any Court to step in

the middle of a very large commercial transaction;

Five, why we believe that a delayed closing isn't the immense harm that the objectors say it is. That will require us I think to go through the settlement agreement as we go forward.

THE COURT: By the way, another preliminary matter I should point out is that I actually received all of the opposition papers myself yesterday morning from all of your various messengers and/or lawyers, but there is nothing about that that affects anything that I do.

Go ahead.

MR. SHORE: I think, in order to follow along, if your Honor has the declaration of, Iliana Cruz, which we submitted, which has all the exhibits and the declaration of Mr. Dean, which has additional exhibits?

THE COURT: Yes.

MR. SHORE: It may help to follow along, because I would like to start with the indenture.

THE COURT: I have the indenture. You submitted it as a separate document. That's Exhibit M.

MR. SHORE: If you have that, and follow along, that would be useful. I actually have just excerpts of it for people that don't want to follow along in the bigger book, but

you having it separate I think it will work fine.

I think if we boil it all down, there are not many

provisions of the indenture that are at issue. I think we start on page 85 of the indenture, which is Section 9.02, Remedies, which is in Article IX, entitled "Defaults and Remedies."

We start with the beginning language of 9.02 on page 85: "In addition to the rights conferred or obligations imposed upon the trustee under Section 9.01 to accelerate the principal of the Bonds, upon the occurrence and continuance of any Event of Default, then and in each and every such case, the Trustee in its discretion may and upon the written request of the owners of the majority in principal amount of the Bonds then outstanding and receipt of indemnity to its satisfaction, shall in its own name and as the trustee of an express trust:"

And then we go down to the two factors which have been implicated here:

"(c) bring suit upon the Agreement, the Bonds or any Credit Facility; or

"(d) by action or suit in equity enjoin any acts or things which may be unlawful or in violation of the rights of the owners of the bonds."

That's the provision that the objecting parties and the Court below rely upon to say that the trustee has the right to start the proceedings.

Then we turn to 9.04, which is the provision they cite for keeping us, or for arguing that they have the right to

settle on any terms, and it begins:

"Anything in this Indenture to the contrary notwithstanding, the Owners of the majority in principal amount of the bonds then outstanding hereunder shall have the right, by an instrument in writing executed and delivered to the Trustee, to direct the time, method, and place of conducting all remedial proceedings available to the Trustee under this indenture or exercising any trust or power conferred on the Trustee by this Indenture."

That's the provision they say that once the trustee has started the suit, a majority of the bonds can direct that that suit be settled on any terms that the trustee deems appropriate.

Then you turn to 9.06.

I will skip by 9.05, if I need to address it later, this concept that both the trustee and the issuer, here the airport, are immune from any suit even if they breach the indenture, and go to 9.06, which is following the two provisions that say that the trustee can start a suit and the majority can direct that trustee in that suit:

"Notwithstanding any other provision in this Indenture, the right of any owner to receive payment of the principal of or purchase price of and interest in any premium on his Bond on or after the respective due dates expressed therein, or to institute suit for the enforcement of any such

payment on or after such respective date shall not be impaired or affected without the consent of the Owners."

Those are what we call the 916(b) rights afforded by the Trust Indenture Act.

That is to avoid the situation where a majority whose interests are not known as to why they want to reach a deal with the issuer can't reach a deal which interferes with the right of principal to receive principal and interest.

THE COURT: There is no question on the papers that the Trust Indenture Act doesn't apply.

MR. SHORE: The Trust Indenture Act does not apply.

Then if we turn to page 104 of the indenture, because we are not just talking about a settlement of the amount owing under the indenture with a cancellation of the indenture, which is what the settlement order provides, but a termination of the lease and the relet of the lease or the relet of the premises under a new lease under which we have a rental stream and the cancellation of guarantee which Delta provided.

Section 12.01 talks about how you go about modifying those things. It is on page 104.

It says:

"Neither this Indenture nor the agreement" -- the agreement being defined as the lease -- "shall be modified or amended in any respect subsequent to the date of the issuance of any series of bonds hereunder except as provided in and in

accordance with and subject to the provisions of this Article."

If you can't do it in article 12, you can't do it.

We go to 12.03 which is on page 105.

12.03(a), which talks about other than a nonmaterial modification to the indenture, "The owners of not less than a majority in aggregate outstanding principal amount of the bonds shall" --

THE COURT: 12.03 relates to a supplemental indenture?

MR. SHORE: Yes.

THE COURT: This is not a supplemental indenture.

MR. SHORE: It is not a supplemental indenture, but even if they wanted to do it by establishing an indenture with the very terms they are talking about, which is the acceptance of an unsecured claim in the amount of $260 million, the provision of a note, that is, if they put that in an indenture, that is subject to 12.03(a), and the carryover on 106 beginning at, "Provided, however, that, unless approved in writing by the Owners of all the Bonds, nothing herein contained shall permit, or be construed as permitting (i) a change in the times, amounts, or currency of payment of the principal of or interest or any premium on any bond changing the terms of the purchase of Series of Bonds pursuant to Section 2.02."

THE COURT: OK.

MR. SHORE: With an elision, "or a reduction in the principal amount or redemption price of any Bond or a change in

principal amount or redemption price of any bond, or a change in the method of determining the rate of interest thereon."

They cannot enter into an indenture which provides this or change the terms of the indenture in those romanettes

without consent of all the bondholders.

If you go down to Section C on page 106:

"Within two years after the date of the giving of such notice," which is that we are going to enter into, a supplemental indenture -- "the Issuer and the Trustee may enter into such supplemental indenture in substantially the form described in such notice, but only if there shall have first been delivered to the Trustee (i) the required consents in writing of the Owners of the Bonds."

If you are going to change principal and interest, you have to get consent of all the owners of the bonds.

12.06 deals with the guarantee. Again the settlement agreement provides and the settlement order ratifies a breach of the guarantee, that is, an agreed-upon breach between the indentured trustee and the debtor.

The issuer, and this is 12.06, the second paragraph, "The Issuer shall not enter into and the Trustee shall not consent to --

THE COURT: But the bankruptcy court plainly had the power to change the guarantee given its jurisdiction over Delta.

MR. SHORE: It had the power to allow the rejection of the guarantee.

THE COURT: All right.

MR. SHORE: But the issue is here with respect to the settlement of that by the indentured trustee and the issuer. It is more tied than the issue of resolving disputes under the

indenture, to which the debtor is not a party. But nonetheless the acceptance of that deal requires, again, written consent of the owners of all bonds then outstanding. You cannot change the obligations of the company under the agreement relating to the payments of the principal in premium, if any, and interest on the bonds. Again, you can't do it without consent.

The same with respect to the guarantee, which is the last paragraph in Section 12.06 on 108.

I don't think there's any dispute here that the language in this indenture is traditional corporate --

THE COURT: There is also no dispute, is there, that the bankruptcy court had the power to change the guarantee despite what was written in the indenture?

MR. SHORE: He has the power to change the guarantee. He doesn't have the power to release the indentured trustee and the issuer for any actions on their part which led to that result.

THE COURT: OK. Go ahead.

MR. SHORE: So in order to harmonize these

provisions --

THE COURT: You're really arguing on this appeal not the powers of the bankruptcy Court over Delta and the debts and obligations of Delta, but rather over the scope of the release or the existence of the release to the Kent County Airport Board and the trustee.

MR. SHORE: Yes. And the interpretation of the indentures, which is purported to be an order binding upon us, which says that our minority holder rights are moot in the

event of a default. I don't think that there's any textual support in the indenture for a reading which says in a default setting we recognize the right to insist upon principal and interest but that right goes away when there is a default.

THE COURT: Just so that I'm clear, on this appeal, you're really seeking rights against the trustee and KCAB?

MR. SHORE: Yes. If they don't have the authority to enter into the transaction, Delta doesn't have the authority to enter into the transaction with them.

THE COURT: With respect to rights against and the scope or validity of releases against the trustee and the KCAB, you contend that that's not an issue that would be mooted even if the closing goes forward tomorrow, because your basic contention is that there was no jurisdiction by the bankruptcy court to grant those nondebtor releases to the nondebtors, right?

MR. SHORE: Well, I think that that is correct. But there are also alternate permutations of rulings which would lead to a substantial risk of mootness.

For example, if your Honor found that there was related-to jurisdiction but nonetheless found that the bankruptcy court was without power to grant releases or make declarations under a contract which was not properly before it, then in that event, in that ruling you still have to deal with the issue of mootness.

This is exactly what happened in Metromedia. The Second Circuit took up the issue of the releases in a plan,

made a finding that the bankruptcy court acted outside its powers, its statutory powers and nonetheless found that the appeal was equitably moot because the third parties had closed or consummated the plan with the debtors and had relied upon the existence of releases.

We have tried everything we can to get ourselves outside of Metromedia by putting the indentured trustee and the airport on notice, by bringing an application for a stay. But if this transaction closes and your Honor finds that they never should have gotten the releases and nonetheless finds that it's equitably moot, we are irreparably harmed.

In addition, the issue of being able to proceed against the airport and the indentured trustee --

THE COURT: But Metromedia was a case in which there

was to effort to seek a stay or an expedited appeal, and the Second Circuit took all of that into account in determining equitable mootness.

MR. SHORE: But I think the issue that the Second Circuit was raising there, I don't think it was whether it took place a year later or six months later. Once the transaction closed, that is, there was a reliance upon the existence of the releases and the transaction closed, under the analysis it would have been equitably moot the next day because there was the reliance upon that.

THE COURT: Why did they go through all of the analysis about what the appellants had failed to do?

MR. SHORE: I think that is an outgrowth to some extent of the Chateaugay opinion, what you need to do to

establish the absence or the presence of equitable mootness in constitutional mootness. And they listed off a series of factors, including that the third party was put on notice that its claims were subject to reversal and any release it got in that context was subject to reversal or vacatur at a later date.

But I think if you look at the analysis, it was the fact that a closing took place, that is, the plan was consummated. These creditors, in reliance upon their releases, voted in a certain respect in connection with that plan, and, according to the analysis, might not have done that if they had

been told that they weren't getting releases.

But focusing only on the airport and the trustee ignores the fact that Delta is a party to this. I will come back to it a little bit later in talking about what we want here, why we're fighting, but the ability to sue an indentured trustee in a drawn-out proceeding to recover for a failure to follow a reasonable person standard or a prudent person standard is a very different animal than Delta being put to the issue, are you going to assume this lease and pay all the bondholders in full or are you going to reject this lease and get rid of your Cincinnati hub?

That's a different issue. To allow the appeal as against Delta to become equitably moot by allowing these transactions to occur, allowing the legal relationships of the parties to be changed, leases to be cancelled, new leases to be signed, the reletting of the airport, it is going to be, and I

don't think anybody has argued that it is clear, and we've never argued that it is clear that our appeal as against Delta isn't subject to a significant claim of equitable mootness.

We don't want to sue the trustee. What we want here is on behalf of all bondholders for these leases to be assumed or the lease to be assumed and all payments under the bonds to be made. But I will, I think, try to come back to that later.

THE COURT: You've convinced me, by the way. How long with respect to time, by the way? How long do you want for the

argument?

MR. SHORE: I would think another half hour, your Honor.

THE COURT: You have gone for about 20 minutes. Why don't we say another 20 minutes, so 20 minutes after 5:00.

OK. Thank you.

MR. SHORE: Rather than address their cases, which they try to allay the court's concerns, if there are any, that this happens all the time, I think if you look at those cases closely, there has never been a Court that found that 316(b) rights become moot in a default setting. I think the cases are the opposite. Nor will you find a case in which someone solved a minority bondholder problem by barring someone else's bankruptcy and getting basically a no-action antisuit injunction which barred anybody from challenging the indentured trustee's actions or the issuers.

Two issues with respect to my second point, which is jurisdiction, because this is not just an interpretation issue.

There are questions with respect to jurisdiction and

there are questions with respect to statutory power. They are separate. The question with respect to jurisdiction is this. You need to parse it by the action of the Court. The mere fact that you invoke related-to jurisdiction doesn't let the Court do everything with respect to a party. What are the releases? How are the releases related to the bankruptcy? How is the

injunction related to the bankruptcy? And how does the declaration that what the trustee did here is appropriate related to Delta's bankruptcy?

The best way I think to show that it is not related is to talk about what happens if there isn't a release and if there isn't an injunction and if that declaration hasn't come forward. Assume we sue and we win and we obtain $30 million against the indentured trustee. That doesn't affect Delta at all. Delta has no, and I haven't seen anything from anybody that --

THE COURT: How can you extract the releases from the entire text of the settlement?

The settlement agreement on its face says that no portion is severable, that it is an integrated document, and it's fairly clear from the structure of the settlement that that's true.

MR. SHORE: I agree.

THE COURT: KCAB is not going to enter into the modification of its agreements without a release.

MR. SHORE: That's right.

THE COURT: How can you separate out the releases and

say, well, you can only look at the releases and ask whether the releases are arising out of or related to the bankruptcy?

MR. SHORE: The Fifth Circuit in Zale did exactly that and said once you put an agreement in front of the judge, the

bankruptcy court, that does not invoke the jurisdiction of the court to do everything with respect to that agreement.

What happened here, as I understand what they said was the deal is important to Delta and the releases are important to the third parties. Therefore, the bankruptcy Court can grant the releases.

What that does is that establishes jurisdiction based upon an agreement of the parties. You can't do that. If the party said I'm sorry, I would love to do this deal, but I'm in prison right, now the bankruptcy court can't write an order allowing the prisoner out to do the deal.

THE COURT: The bankruptcy court didn't accept jurisdiction simply because the parties said we consent to jurisdiction, we agree to jurisdiction.

The bankruptcy court looked at the structure of the settlement and looked at the terms of the settlement and concluded that they were integrated and arise out of and were related to Delta's bankruptcy. It was not as though there was a provision of the settlement agreement that was not related to Delta's bankruptcy.

MR. SHORE: Looking at Zale closely, you have to look at each integral piece. This is an agreement to establish jurisdiction. In fairest terms what they said was if the bankruptcy court doesn't exercise jurisdiction to grant these

releases, we are not doing this deal. Leaving aside the issue

of arising -- I'm sorry.

THE COURT: No. You have to ask yourself what is the transaction? When you say we won't do this deal, what is the deal?

The deal includes, among other things, the elimination of the lease and the restructuring of Delta's payments under the prior lease. It's hard to get something that is -- I'm sure there are other examples, but it's hard to get something that is not so integrally involved in Delta's bankruptcy.

MR. SHORE: Respectfully, your Honor, if, for example, they had put in the lease, the indentured trustee or the airport had said, I want a gate I don't own, as a condition to this deal, I will give you the lease, Delta, as long as the bankruptcy court writes an order requiring a third-party to deliver me a gate it doesn't own, that would be outside the bankruptcy court's jurisdiction.

The mere fact that it's in a settlement agreement the parties have put before the judge does not give the judge jurisdiction over it. Even if there were jurisdiction, there's a question of power.

This is an important point that everybody has elided over. There is no statutory basis in Title 11 or 28 or anything else that has been invoked by any party which would say that the bankruptcy court had jurisdiction or had the power to declare rights under this contract, to issue an injunction,

or to grant releases.

As the Court in Metromedia found, you are not free to grant releases without a statutory provision to rely upon. There is nothing they rely upon, there is nothing in Section 363 of the Bankruptcy Code that says that you can't release us, there's nothing in Section 365 of the Bankruptcy Code, the two provisions they went under --

THE COURT: What do you do with your colleague's statement to the bankruptcy judge that he appeared to be nodding along as the bankruptcy judge said: There's no question about jurisdiction here. I have jurisdiction to enter the settlement agreement, don't I?

Your colleague appeared to say no problem with respect to jurisdiction. Of course you have the jurisdiction, the power to order the settlement agreement, and moved on.

If this is so clear to you, and there are a series of factors that I have to go through on the issue of the stay and this is a factor with respect to jurisdiction that logically comes up under likelihood of success on the merits, likelihood of success on the merits of jurisdiction, the appellant's counsel didn't dispute jurisdiction before the bankruptcy judge, thought it was so clear that it was not a matter of dispute.

MR. SHORE: I think in the context that you may be reading it, or that may be reading a little out of context.

The brief very clearly said the court does not have jurisdiction to do this. It doesn't have the power to do it.

THE COURT: OK.

MR. SHORE: The point was not argued, and ultimately the bankruptcy court did not think that the issue had been waived or had been dropped because he made it a point to deal with the issue of jurisdiction, saying the argument was frivolous, but nonetheless he did not perceive the statements made by counsel, which are probably the best evidence of what happened, as being a waiver such that he did not need to deal with it.

THE COURT: I don't think you can waive jurisdiction.

MR. SHORE: Right.

THE COURT: So the bankruptcy judge couldn't really have said there's waiver.

What I was asking was if the argument was so clear that there was a lack of jurisdiction in the bankruptcy court to do this, how could counsel so blithely go along with the bankruptcy court's statement that of course there's jurisdiction here. It wasn't just sort of nodding. I mean, counsel said that of course the court had jurisdiction to enter the settlement order.

MR. SHORE: Right. You know, I do not read the transcript that way.

THE COURT: OK.

MR. SHORE: I see it more as saying it is not important to argue. But that's where we are.

THE COURT: OK.

MR. SHORE: Let me spend a few minutes on who we are and what we want.

The rhetoric in the briefs was I think distractingly thick about us being extortionists, hostage takers, vast minority, and economic terrorists we were referred to below. The press referred to us, quoting somebody on the debtor's side, as being a smudge.

I think the rhetoric probably speaks the other way. You need the facts, your Honor. We're six bondholders. They bought claims at various times in the bankruptcy case. Substantially all of their bonds were bought before the settlement was announced. This gets to the issue of their trying to say we are a holdout artist, and I'll come back in a second --

THE COURT: But the timing was substantially all of the bonds were bought before December of 2005. Right?

MR. SHORE: No. Substantially all of the bonds were bought before February 2007, when the deal was announced.

MR. HUEBNER: Your Honor, after December 2005 I think is correct.

MR. SHORE: Yes.

THE COURT: Yes.

It was after Delta's bankruptcy with notice that the income stream for the bonds was imperiled by the bankruptcy, and they continued to hold the bonds while they knew that settlement was being discussed by the trustee.

MR. SHORE: Yes.

THE COURT: And didn't object that the trustee had no power to negotiate away their rights.

MR. SHORE: Well, that's a leap. That's a leap that the debtors have asked you to make.

THE COURT: OK.

MR. SHORE: The fact that the trustee is negotiating is not news. The trustee, we went through the provisions, has the right at the direction of the majority to negotiate. You just can't cut some deals. You can negotiate, and you better be telling the party on the other side. As you would expect in any deal with one of these provisions, I can do a lot of things. If in fact you want to add more time to talk about things that people do, you could strip all covenants --

THE COURT: Could I just stop you.

MR. SHORE: Sure.

THE COURT: I don't want to sort of interfere with the orderly presentation of what you were going to tell me about the bondholders.

Let me just be clear with respect to when they bought the bonds and what the significance was in your mind vis-a-vis

what the appellees are telling me about them.

So most, substantially all of the bonds were bought after December 2005, after Delta was in bankruptcy. And what was the other date that you wanted to tell me about specifically?

MR. SHORE: Substantially all before the settlement was announced.

THE COURT: OK.

MR. SHORE: I don't think we need to spend any time about the concept that we're capped at our purchase price or the policy implications of that. But I want to make one point here on this and then move on.

It is plainly wrong and misleading for the other side to say that they represent the overwhelming majority here. It is wrong. This is why, among other reasons, I wanted to talk about the exhibit which shouldn't be coming in.

But let me give you the quick rundown of facts. February 9, the debtors put out their plan and disclosure statement. That said nothing about this settlement, provided no information to bondholders as to what the settlement was, what their alternative rights were or anything.

On February 27, again, after substantially all the bonds were bought, two groups of funds, Oppenheimer and Franklin -- this is in the Dean Exhibit O. So two people -- one from Franklin, one from Oppenheimer -- on behalf of the

funds gave a direction to the indentured trustee to enter into the settlement which cancelled the lease, cancelled the guarantee, and cancelled the indentures.

The trustee, rather than saying, I can't enter into a deal which impairs the 316(b) rights of a minority until I get full approval, nonetheless accepted that and entered into the deal with a side indemnity in place from the directing majority. At that time they only spoke for 60 percent of the bonds. So when the indentured trustee accepted the letter, 40 percent of the outstands bonds did not deliver any consent to

enter into this deal. That is not an overwhelming majority supporting this deal.

THE COURT: OK.

MR. SHORE: Then the bondholders voted. Somehow it has been transformed into the vote on the plan was a referendum on the deal. The evidence below was directly to the contrary, that Delta never expected it to be a referendum on the deal.

But the votes came in. According to debtor's counsel in a statement made on the record at the hearing, which wasn't evidence and which they are trying to bolster now with an affidavit from a person I wanted to depose, $168 million of the $413 million outstanding voted.

MR. HUEBNER: That's totally incorrect, your Honor.

THE COURT: OK. Hold on. I will avoid any references to tennis, but I really prefer one side at a time and then a

response.

So, Mr. Shore has the podium.

Go ahead.

MR. SHORE: By my math that's 41 percent of the outstanding bonds voted in favor of the plan. There is no explanation anywhere what happened to the 60 percent that gave the direction letter.

If you want to say that the plan was a referendum on the deal, 59 percent of the outstanding bondholders have not consented to this treatment. So when they say majority, what they mean is two bondholders gave a direction. I think that's the best way to look at it, because I don't see the plan as a

referendum. 40 percent of the bonds have not delivered consents. We happen to represent 10 percent, or one-quarter of the nonconsenting bondholders, which is actually a pretty big turnout when you talk about ad hoc committees. 25 percent of the people who never delivered consent to this deal have hired counsel and have fought this.

Importantly, the two who voted in favor were not our fiduciaries. This is what 316(b) protects. I don't know what their motivations were. Assume they were short bonds, or they had hedged, they had bought credit default insurance, they were indifferent to a settlement at 70 cents. I don't know. But under 316(b), that's irrelevant. Because no matter what their intent is, they cannot compromise my right to principal and

interest.

THE COURT: I'm sure that Mr. Huebner can hear you and I can, so --

MR. SHORE: Sorry, your Honor.

We stayed above the rhetoric. Again, terrorist is maybe a bit much.

But look at the counterpart. We are not holdup artists. A holdup artist is somebody who sees a legal loophole, dives into it, and tries to extort a price. For example, the guys who used to register domain names: "www.cocacola.com is mine. I have no interest in using that site. Just pay me off."

Congress said, No, you can't do that. These people bought bonds before this deal was on the table with an expectation that whenever the deal was going to be on the table

it was not going to be an impairment principal and interest.

The people who changed the legal landscape were those who came up with this new procedure which required going to a bankruptcy court for a determination that the 316(b) rights are moot in a default setting.

This is not a holdup. This is not guys who said, oh, I see a scene here, the debtors have just announced that they are going to reject this lease, and they haven't asked for my consent, so I am going to buy one bond and say you don't have consent.

These are people with substantial holdings that existed before this deal closed, before this deal was announced, who are trying to vindicate their rights and the rights of all other bondholders.

Let me clear. What we want here, everybody tries to make much the of the fact that we didn't challenge the fairness the settlement below. That was a litigation necessity. If our point is the bankruptcy court doesn't have the power or the jurisdiction to declare our rights under the indenture and to say this is in our best interests, we can't submit evidence to the court below to say, Your Honor find this is not in our best interests. We can't do that. Let me make clear --

THE COURT: No, sir, not right. That's simply not right, because it would certainly be in your power to argue in the alternative to the bankruptcy court, after extensive discovery, A, you have no jurisdiction, and, B, even if you had jurisdiction, you should not approve the settlement, and here's

why. To say that you simply couldn't argue that is simply not right.

MR. SHORE: Your Honor, I would agree with you except for one thing. When you say extensive discovery, don't forget this proceeding lasted from the beginning of March until the end of April. Discovery was propounded and not responded to until I think April 3 with a response date on the brief of April 11.

To say that these bondholders were required over that time on mount a challenge and to present to the bankruptcy court, in a manner which again could be argued was against -- that is, retain experts, present it to the bankruptcy court, and then still be at risk. And I think there is a risk if you submit it to the bankruptcy court, even with a reservation. The argument is there. Let's talk about what in fact we want.

THE COURT: As I read what the bankruptcy court said, and I don't think that you dispute this, the bankruptcy court said that the appellants had raised only legal issues with respect to the settlement, no factual issues, and had not contested the fairness of the settlement either to Delta or to the bondholders.

MR. SHORE: That's not quite correct, your Honor. If you look at Dean Exhibit O at, I think at 19-20, it's very clear that what was said is we do not believe this is a good deal for bondholders. It may be a good deal for Delta, and we are not contesting that this is not in the best interests of Delta to enter into this transaction. But we said very clearly I think three or four times this is not a good deal for

bondholders.

So when they say that we didn't contest it, that means that we didn't put on evidence in the form of an expert to say here are the five reasons why this is not a good deal, although I think some of it is in the record below and can be argued

from.

Let me just turn to that for a minute. I know I'm using up time here.

THE COURT: Yes. You've got very little time left.

MR. SHORE: First and foremost, we want Delta to assume the lease. I just think, these serious business people, not holdup artists, do not believe that there is any possibility that Delta is going to, and you can see it in their papers about the importance of the hub, reject the lease, pick up all of their stuff and vacate the leased premises, leaving Comair there without a Delta hub in a separate terminal.

Second, if Delta rejects, there is an unsecured claim on the lease. That is settled pursuant to the agreement. There is an unsecured claim on the guarantee. Whether that's capped or not is a legal issue, and we have views as to whether they are going to win that and they have views as to whether they are going to win that. But the one thing the bankruptcy court didn't do and he said it in his decision on Thursday, he did not consider the relet rights. He made no determinations with respect to what the relet rights mean, but nonetheless made a factual finding that our sole resource in a default setting is due to Delta payments under the lease. That's not

correct.

When the lease is breached, the airport has a best-effort obligation to relet the premises. The only

evidence below was that the consultant who was hired by the airport never marketed Delta's terminal to anyone. Nonetheless, they're getting a release for having done that.

The problem with this, and why I focus on the relet rights is it provides a windfall to the airport. The indenture is now cancelled. Our sole recourse is against the $85 million note and the $260 million claim. If Delta files a bankruptcy in two years and goes out of business -- does a TWA, you go in three times and they you liquidate -- the airport will get our $85 million note discharged in the bankruptcy. The stock will be whatever it's worth in the bankruptcy, and the airport in a rejection scenario will be able to lease that to whoever they want and won't have to pay us anything on the bonds.

So the concept that an airport, which has best-efforts obligations to relet these proceeds did nothing and now is obtaining an injunction and a release preventing us from challenging upon that is a fundamental problem we have here.

Then as a last resort we'll go after the indentured trustee and the issuer, but we don't want to do that. This issue should be dealt with in the context of the assumption or rejection of this lease.

THE COURT: That's different what you said in your reply papers.

MR. SHORE: How so, your Honor?

THE COURT: Your reply papers said you wanted the

opportunity to go after the trustee and KCAB.

MR. SHORE: We do, your Honor. There's no question. I Said as a last resort -- no, I'm sorry. We want all parties in this. We don't want anything to happen which is going to interfere with our legal rights via an equitable mootness.

But this is not an instance in which we want to go after an indentured trustee. What we're trying to do is improve recoveries for all bondholders here, but it will come either through an assumption of the lease or an actual payment in respect of relet rights which are gone. That's what's happening.

This is not anybody who is standing around saying we are just standing in front of this deal. We don't think this deal is a good deal.

Now let me address very quickly, your Honor, the question of harm or the harms they set forth. I think you can pretty clearly parse through their papers as to what is a real harm caused by the stay and what is he a harm caused by reversal. If they are not entitled to it in ten weeks because your Honor reverses, they're not entitled to claim a harm based upon that now, that is, the risks that are raised by various people, Delta might not get the hub. Well, if Delta wasn't entitled to the hub, then it can't claim that that is a harm.

I think the only harms that are tied to the ten-week stay that we've asked for are that they aren't going to get

their stock and that people will walk.

If we could spend a moment just in the settlement agreement, which is Exhibit L in our papers, it starts in Section 4.05. The pages aren't numbered.

4.05 says, if the bankruptcy court shall (i) deny the settlement motion, and then (ii) if the settlement order fails to become final by July 15, then any of the parties may terminate this agreement. Those are the termination rights. Nobody has a right to walk unless the order doesn't become final before July 15. "Final" is defined in the, I think the fourth page, the fourth page, which is that an appeal at the end has been withdrawn or dismissed.

If this closing is stayed and the order can't go final, nobody has a right to walk. I point out that in their papers everybody says there's a risk of someone walking, but not one of the parties who has a claimed right to walk under this agreement has said I will walk. But by its terms they don't have a right to walk.

Importantly, also, moving back to 4.01, which is contingency, except with respect to Sections 3.02(b), which are the forbearance payments, and 4.03, which is that the parties have to work to support the settlement, the effectiveness of this agreement shall be conditioned upon entry by the bankruptcy court having jurisdiction over the bankruptcy cases of the settlement order and the settlement order becoming

final.

In order to close this transaction now with an appeal pending, they are going to have to waive the condition. How can they say that we need to post a $330 million bond, which they know we are not going to post, because the transaction won't close when the reason the transaction would close is the parties took an affirmative step waiving conditions in 4.01.

The parties, expecting an appeal, bargained for a period of time in which we could resolve this issue without jamming the court.

THE COURT: That was not successful.

MR. SHORE: Yes. For example, the stock volatility, again, no evidence anywhere there's people speculating as to what might happen or might not happen with respect to the stock or their desire to get it on the date that everybody else gets it.

That's a risk that they allocated to each other in the agreement. Nobody has a walk right if the stock goes up or goes down before July 15. If there is an appeal pending, nobody has a right to walk from this deal if the order is dismissed or withdrawn or the appeal is dismissed or withdrawn. I don't understand. Those are the only harms they have even set forth. I think they are speculative, but they are not harms that are compensable.

Unless your Honor has further questions, I think I've

used up my time.

THE COURT: OK. Thank you, Mr. Shore.

MR. HUEBNER: Your Honor, this is Marshall Huebner

with Davis Polk. Can I be heard by everybody?

THE COURT: Yes.

MR. HUEBNER: Your Honor, let me first begin on a personal note, with profound apologies. It is very rare to appear telephonically in a very important hearing, but as your Honor knows from the papers, this was the long prescheduled closing date for the entire plan's distributional scheme, and I am at Delta headquarters in Atlanta.

Your Honor, I need to hit all four factors, but I think Mr. Shore -- and I understand why -- frankly did his best to draw you away from the four independent factors that they must satisfy.

Frankly, he has said so many things that are totally untrue that I think that I have to correct some of those misimpressions first.

The first, your Honor, he completely misunderstands the definition of "final order." The last five minutes of what he said is completely incorrect.

The definition of "final order" actually says that if there is an appeal, the order is still final if either there is not a stay or the appeal has ultimately been resolved in favor of approving the order.

If I can quote it directly, your Honor, and here we go --

THE COURT: Hold on.

MR. HUEBNER: -- in the event any appeal has been taken, or any petition for certiorari has or may have been filed with respect to such order --

THE COURT: Stop.

MR. HUEBNER: -- and there has not been a stay of such order, or such appeal or petition for certiorari has been withdrawn or dismissed or resolved --

THE COURT: Mr. Huebner.

MR. HUEBNER: -- what the parties actually drafted, your Honor, there is a mere appeal. It is a final order. We are obligated to close tomorrow.

Secondly, your Honor, when he read you Section 405 of the settlement agreement, he left some words out, which I find amazing --

THE COURT: Is there someone from Davis Polk in the courtroom?

MR. HUEBNER: Yes, your Honor.

THE COURT: Hold on, Mr. Huebner.

MR. HUEBNER: Yes, sir.

THE COURT: Every now and then could you take a breath. I have been shouting for you to please stop.

MR. HUEBNER: I apologize, your Honor.

THE COURT: Because of the way in which the phone system works, apparently there is a pause that's required before you can hear someone else talk. So, so long as you're talking, you won't hear the fact that there is someone trying to listen, but I can't listen if I can't participate also.

MR. HUEBNER: I apologize, your Honor. I will stop frequently.

THE COURT: So can you hear me?

MR. HUEBNER: Yes, your Honor. Perfectly.

THE COURT: OK. Let's go back to "final."

I have two questions, because I have also read the settlement agreement and the definition of "final," and I would like to hear what your position is with respect to whether, if there were a stay, the parties to the settlement agreement could walk away and whether they could walk away -- hold on. Keep breathing. OK?

If they could walk away tomorrow, and why that's true.

I should tell you, I have read the definition of "final," and it does seem as though it's a less than clear definition of final under all of the circumstances just in terms of the use of "or" at various places.

There is a reading of it that appears to say the order becomes final if there is an appeal pending but no stay has been issued. So, the very fact, and the parties can advise me about this, the very fact that there is an appeal and no stay

makes the order final. So you can describe for me "final," and then you can take me through the provision of the agreement that allows termination and give me your argument that if a stay was entered the parties could walk away from this agreement tomorrow. OK.

MR. HUEBNER: Sure, your Honor. I will try very hard to breathe in between making each of those points.

Your Honor, the read of "final" that I think the Court just expressed, all three parties who signed this document are in the courtroom. They all know and distinctly intended what it means, which is exactly what you said. The "or" is very

intentional.

If there is a mere appeal, which as of right now is our situation, that does not -- repeat, does not -- prevent the order from being final. In fact, if this court does not issue a stay, the parties are obligated to close tomorrow because the definition of "final" has been satisfied. What

the latter part of the definition says is that if there is an appeal the two ways to have the order still be deemed final are either there is no stay or the appeal has been finally resolved in upholding the order.

The second provision, your Honor -- and given that we wrote it and we are all in the courtroom I think it's pretty clear that we know what it means.

The second provision, your Honor, and, again, he just

read you from Section 4.05, but he left out a bunch of words that govern today. In Section 405, (ii) says: Or if the settlement order fails to become final by July 15, 2007, or is reversed or modified on appeal, then any of the parties may terminate.

That second qualifier, that if it's modified on appeal, I think it's a very real position, if not much more than that, that a stay freezing the order's effectiveness would be deemed a modification. That gives anybody an immediate walk-away right.

The third point, your Honor, is that multiple provisions of the document, including 3.02(c), require the delivery of the consideration on the closing date.

If your Honor turns to the definition of "closing date," it can never, ever be after May 3, 2007, which is tomorrow, because the definition expressly says the closing date can in no event be later than one of two dates, which now both work out to tomorrow.

As your Honor knows, because you've obviously read the stuff with extraordinary care, the bankruptcy court ruled on two different occasions after extensive evidence that the receipt by the bondholders of their distributions on the plan's initial distribution date was a critical, central component of this agreement. That's why it's structured this way. Because it was, unless we are stayed by a higher court from closing, we

must give them their value tomorrow because that was a critical, critical piece of the consideration.

Your Honor, to hear Mr. Shore, of all people in the world, argue to you that volatility in distributions and not getting their equity for a couple of months doesn't constitute harm is simply remarkable.

Mr. Shore filed a pleading on January 12, 2007, in the Adelphia bankruptcy, your Honor, where he was on my side of the table, a small group of dissenting bondholders, 11 in that case as opposed to the 6 here, in a class that had overwhelmingly, or among a group that had overwhelmingly voted in favor of a plan, 97.5 percent to our 97.35 sought a stay. Here is what Mr. Shore represented to the court as the massive harm from his client's not getting their distributions on and when scheduled. May I read the quote, your Honor?

THE COURT: No.

I don't find that very helpful. It is not an area of the law where I really require lawyers to represent only one side, so long as in any individual litigation they only represent one side.

So I understand the argument that if a distribution of securities is held up, at the very least those who are to receive the securities are prevented from getting their right to make their own market choices as to whether to keep the securities or sell the securities and that as a result of that

they are denied a right that they would otherwise have.

MR. HUEBNER: Thank you, your Honor.

THE COURT: There's no way to calculate that right. I really don't need what Mr. Shore said in another litigation.

MR. HUEBNER: Understood.

Again, given that I think it is very straightforward that not receiving securities for months while everyone else can trade and they are very volatile in a post-emergent scenario -- I will leave it at that.

What I would like to do, your Honor, is hit a couple of more specific things he said, and then turn back to what I was hoping to tell the court today.

First of all, your Honor, Delta will never assume this lease. We have been very clear about that all along.

THE COURT: You have just until about 5 after 6:00.

MR. HUEBNER: Thank you, your Honor.

The second thing, your Honor, Mr. Shore told you that the bankruptcy court never considered relet rights. That is